

Clean Power Plan Litigation Update



MAGGIE OLSON
ASSISTANT ATTORNEY GENERAL
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EPA's Rules Relating to Carbon Dioxide Emissions



NEW SOURCE RULE
EXISTING SOURCE RULE

EPA Rulemakings



- **March 2012: First Proposed Carbon Dioxide Standards for New Power Plants .**
 - Single standard for all fossil fuels-fired EGUs – natural gas combined cycle technology.
 - Withdrawn September 2013.
- **September 2013: Proposed Carbon Dioxide Standards for New Power Plants.**
- **June 2014: Proposed Carbon Dioxide Standards for Existing Power Plants.**
- **June 2014: Proposed Carbon Dioxide Standards for Modified and Reconstructed Power Plants.**
- **October 2014: Clean Power Plan Notice of Data Availability.**
- **October 2014: Clean Power Plan Supplemental Proposal for Tribes.**

EPA Rulemakings



- **North Dakota submitted technical and legal comments.**
 - Attorney General's Office.
 - Department of Health.
 - Public Service Commission.
- **42 U.S.C. § 7607(6)(B) requires that objections be raised during the public comment period.**

Final Rules: August 3, 2015



- Carbon Dioxide Standards for New, Modified, and Reconstructed Power Plants – 111(b)
 - **111(b) is a prerequisite for 111(d)**
- Carbon Dioxide Standards for Existing Power Plants or “Clean Power Plan” – 111(d)
- Proposed Federal Plan for the Clean Power Plan (including Model Rules)

Early Litigation Relating to EPA's Rulemakings



NEW SOURCE RULE
EXISTING SOURCE RULE

Pre-Publication 111(b) Litigation



- **Las Brisas Energy Center LLC v. EPA**
 - June 12, 2012: Power plants and industry groups alleged that the proposed rule constituted final agency action because new plants that began construction after April 13, 2012 (date of proposal) would be subject to the standard.
 - December 13, 2012: D.C. Circuit dismissed the challenges as premature – not final agency action.
- **Nebraska v. EPA**
 - January 15, 2014: Shortly after proposal issued, NE sought an order enjoining EPA's work and requiring the proposed rule be withdrawn, alleging violation of the Energy Policy Act of 2005.
 - ✦ Argued that EPA may not base required technologies solely on their use by facilities receiving assistance under the Act, so CCS cannot be "adequately demonstrated."
 - October 6, 2014: NE federal district court dismissed – "attempt to short-circuit the administrative rulemaking process" – because review needs to be of final agency action in the D.C. Circuit Court of Appeals.

Pre-Publication CPP Litigation



- **In re Murray Energy Corp.**
 - June 18, 2014: Coal company filed a petition for extraordinary writ, seeking to enjoin EPA from conducting the rulemaking. Alleged that EPA was acting beyond its power because power plants were already regulated under CAA § 112.
 - June 25, 2014: 9 states filed an amicus brief.
- **West Virginia v. EPA**
 - August 4, 2014: 12 states filed a petition for review asking that a 2011 settlement agreement be reviewed. Also relied on CAA § 112.
 - September 2, 2014: 11 states filed a motion to intervene in support of EPA.

Pre-Publication CPP Litigation



- **Murray Energy Corp. v. EPA**
 - August 15, 2014: After EPA published its proposed rule in the Federal Register, the coal company filed a second petition, alleging it was an illegal final action because it violated an express statutory prohibition on regulating sources under both CAA §§ 112 and 111(d). Challenging its authority to initiate rulemaking – not the substance.
- **D.C. Circuit's Decision**
 - June 9, 2015: Issued a decision in *In re Murray Energy Corp.* that also addressed the other 2 petitions, in which it concluded it did not have the authority to review a non-final rule.
 - July 22, 2015: States filed petition for rehearing or rehearing en banc.

Pre-Publication CPP Litigation



- **In re West Virginia**
 - August 3, 2015: 15 States filed an emergency petition for extraordinary writ. Argued that a stay was warranted before formal publication because EPA established deadlines beginning in September 2016 that apply regardless of when the rule is published. Also argued the rule is illegal because power plants regulated under CAA § 112 and it exceeds EPA's statutory authority.
 - D.C. Circuit declined to consolidate with earlier petitions, instead opening a separate case.
 - September 9, 2015: in a one-page order, the D.C. Circuit denied the request for an emergency stay, holding it didn't satisfy stringent standards for circumventing Federal Register procedures.

Pre-Publication CPP Litigation



- **Oklahoma v. McCarthy**
 - July 1, 2015: OK filed a lawsuit asking for declaratory and injunctive relief to prevent EPA from finalizing its CAA § 111(d) proposed rule, arguing it exceeded EPA's statutory authority and already forcing OK to restructure its energy structure.
 - July 2, 2015: OK federal district court issued briefing order on the issue of jurisdiction.
 - July 17, 2015: After OK submitted its initial brief, the court dismissed, holding further briefing unnecessary. Determined that it was not final agency action and jurisdiction is in D.C. Circuit.
 - August 24, 2015: 10th Circuit denied OK's request for injunction pending appeal.

Pre-Publication Litigation



- **Early cases clarified that:**
 - Challenges must wait until after the rule is published in the Federal Register.
 - Challenges must be in the form of a petition for review filed with the D.C. Circuit Court of Appeals.
 - Under 42 U.S.C. § 7606, petitions must be filed within 60 days of publication.
- **What is a petition for review?**

Current Litigation Relating to EPA's Rules



NEW SOURCE RULE
EXISTING SOURCE RULE

Lawsuits Filed: October 23, 2015



- **10/23/15: Both 111(b) and 111(d) were published.**
- **12/22/15: Deadline to file petitions for review.**
- **ND filed petitions for review on both rules.**
- **Other states and industry also filed petitions for review.**

111(b) Litigation



- **10/23/15: State of North Dakota**
- **10/30/15: Murray Energy Corp.**
- **10/30/15: Energy & Environment Legal Institute**
- **11/3/15: 23 State Coalition (West Virginia, Alabama, Arizona, Arkansas, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, Missouri, Montana, Nebraska, North Carolina, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Wisconsin and Wyoming)**

111(b) Litigation Status



- All cases have been consolidated with No. 15-1381, North Dakota v. EPA.
- Movant-Intervenors for EPA include environmental groups, public health organizations, and several states.
 - California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, New Hampshire, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, Massachusetts, District of Columbia, City of New York, and Minnesota.
- North Dakota's preliminary filings are due 11/27/15, including non-binding statement of issues.

CPP Litigation



- In less than 12 hours, it became the most litigated environmental rule.
- 27 state petitioners.
- Industry petitioners, including trade associations, coal interests, and utilities.
- Movant-Intervenors for EPA include power companies, environmental groups, public health organizations, and several states.
 - California, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, Washington, and the cities of New York, Philadelphia, Chicago, Boulder, South Miami, and Broward County, Florida.

State Petitioners



- **North Dakota**
- **Oklahoma**
- **Mississippi**
- **24 State Coalition (West Virginia, Alabama, Arizona, Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, Missouri, Montana, Nebraska, New Jersey, North Carolina, Ohio, South Carolina, South Dakota, Texas, Utah, Wisconsin, and Wyoming)**

Industry Petitioners



- Basin Electric
- Lignite Energy Council
- Minnkota Power Cooperative
- Montana-Dakota Utilities Co.
- And many more!

CPP Litigation Status



- All cases have been consolidated with No. 15-1363, West Virginia v. EPA.
- North Dakota's preliminary filings are due 12/18/15, including non-binding statement of issues.
- Motions to Stay are pending:
 - 11/5/15: Deadline to file
 - 12/3/15: EPA response to motions
 - 12/23/15: Replies

ND's Motion to Stay 111(d)



- **Factors considered for granting a stay:**
 - Likelihood of success on the merits
 - Irreparable injury
 - Possibility of substantial harm to others
 - Public Interest

Legal Arguments



- EPA can't regulate existing sources under CAA § 111(d) because they're already regulated under CAA § 112.
- EPA exceeded its authority, violating the state's rights under the Clean Air Act.
- EPA is unlawfully regulating "beyond the fence-line."
- North Dakota wasn't given an opportunity for notice on comment on changes from the proposed to the final rule.

Irreparable Harm



- **EPA's analysis shows plant retirements in 2016**
 - Coyote Station
 - R.M. Heskett Unit 1
 - MRYS Unit 1
 - Spiritwood Station
- **EPA's analysis shows plant retirements in 2018**
 - Coal Creek Station Unit 1
 - R.M. Heskett Unit 2

Irreparable Harm



- Deprives ND of its sovereign authority, interests, and policies.
- Economic loss due to harm to ND's budget.
 - Tax revenue from coal conversion and coal severance.
 - Revenue from royalty and lease payments from coal on state lands.
- If successful on the merits, ND will not be able to recover economic damages to compensate the State for the significant resources needed to implement the rule.

Irreparable Harm Declarations



- **Dave Glatt, NDDH**
- **Jessica Binder, Mercer County**
- **John Neumann, North American Coal**
- **Kelly Schmidt, State Treasurer**
- **Ladd Erickson, McLean County**
- **Lance Gaebe, ND Department of Trust Lands**
- **Lynn Helms, Department of Mineral Resources**
- **Randy Christmann, ND PSC**
- **Ryan Rauschenberger, Tax Commissioner**
- **Tyler Hamman, Transmission Authority**

North Dakota Administrative Actions



- AG sent a letter to EPA Administrator McCarthy asking her to stay the CPP Rule, raising issues similar to those in North Dakota's Motion to Stay.
- AG filed a Request for Reconsideration of the CPP Rule because North Dakota was not given an opportunity to comment on the drastic changes from the proposed rule.

Anticipated Litigation Timeline



- **CPP Rule:**
 - Spring 2016: Decision on Motion to Stay
 - Spring – Summer 2016: Merits Briefing
 - Late 2016 or early 2017: Decision on Merits
 - 2017-2018: Supreme Court
- **111(b) Rule: Not as complex, so could get an earlier decision.**

Next Steps



- **Aggressively seek stay of CPP Rule, telling North Dakota's story.**
- **Prepare for merits briefing on 111(b) and CPP Rule.**
- **Take steps necessary for North Dakota to get the 2-year extension for the state plan submittal.**